No. 12,673

IN THE

United States Court of Appeals

For the Ninth Circuit

COLES TRADING COMPANY, a corporation,
Appellant,

vs.

SPIEGEL, INC., a corporation,
Appellee.

Petition for Rehearing

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TABLE OF AUTHORITIES CITED

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To the Honorable Judges of the Court of Appeals for the Ninth Circuit:

COMES Now appellant in the above-entitled cause, and presents this petition for a rehearing, and in support thereof, respectfully shows:

I.

In regard to the question of whether Spiegel intended to assume the obligations of the lease, petitioner respectfully urges Your Honors to reconsider the problem for the following reasons:

(a) The per curiam opinion indicates that Your Honors refused to consider extrinsic evidence offered by petitioner which shows that Spiegel, by its conduct and by its testimony at the trial, gave the agreement the same construction as now urged by petitioner. This refusal evidently arose from the rule that extrinsic evidence is not admissible to vary the terms of a written contract.

Petitioner respectfully urges that this holding requires Your Honors to assume the very conclusion here at issue—the meaning of the terms of the agreement; and wishes to call Your Honors' attention to the fact that no provision of the agreement is contradicted by this evidence, and that under such circumstances, Arizona law requires that it be considered. *Crone v. Amado,* 214 P.2d 518; 69 Ariz. 389 (1950).

Moreover, petitioner respectfully points out that Your Honors *did* consider, and did attach some importance to, extrinsic evidence offered by Spiegel against petitioner—the letter of your petitioner's former attorney.

(b) The opinion states that the exception by which Spiegel was relieved from the duty to make structural repairs fails to show that Spiegel would have been bound in the absence of such a provision. The provision is said to be immaterial because, it is said there was "no obligation which Spiegel was required to protect itself against." Petitioner wishes to point out that such a statement is con-

trary to the express provisions of the document in question and refers Your Honors to the last sentence on page seven of the Transcript of Record.

(c) The opinion indicates that Your Honors adopted the contention of Spiegel that the provisions excepted to were only limitations on the estate, and not positive obligations of Spiegel. In so doing, the opinion indicates that Your Honors may have overlooked the fact that the purchaser of an estate cannot make exceptions to the obligations connected with the estate unless they are his *own* obligations, since it is impossible to make exceptions to somebody else's obligations.

II.

On the question of which party should bear the risk for failing to insert a specific provision dealing with the taxes, the problem should depend upon whether, as a matter of law, the instrument was a sublease or an assignment. Petitioner respectfully urges that this question be given further consideration for the following reasons:

(a) The opinion indicates that Your Honors adopted the contention of Spiegel that the Arizona statute gives petitioner a right of re-entry. Petitioner respectfully points out that, since the Arizona statute applies only to *leases,* such a holding requires Your Honors to assume the very conclusion at issue—whether the instrument was a lease or an assignment. See *Porter v. French,* 9 Ir. L. Rep. 514, abstracted in 42 L.R.A. (NS) 1086.

(b) After assuming that a right of re-entry existed, the opinion indicates that Your Honors further assumed that by the law of Arizona a right of re-entry is a reversion. Petitioner respectfully urges that such an assumption is

without justification, since it is a clear departure from the common law, which cannot apply to a case arising under the law of Arizona, and refers Your Honors to the discussion in *Sexton v. Chicago Storage Co.,* 129 Ill. 318, 21 N.E. 920 (1889), cited in petitioner's opening brief, which shows that such a rule is violation of the common law, and also to the Restatement of Property, Sec. 154(a) and to *John W. Masury & Sons v. Bisbee Lumber Co.,* 49 Ariz. 443, 68 P.2d 679 (1937), wherein it was held that the common law as it existed at the time of the Revolution is the law of the State of Arizona.

(c) As authority for this proposition, the opinion cites only the case of *Davidson v. Minnesota Loan & Trust Co.,* 158 Minn. 411, 197 N.W. 833 (1924), but this case does *not* hold that a right of re-entry is a reversion, nor that a right of re-entry changes an assignment to a sublease, but holds only that an *expressly reserved right of re-entry* may be enforced despite the *absence* of a reversion.[1]

III.

If the extrinsic evidence offered by petitioner is considered, along with the documents themselves, the only conclusion that may reasonably be drawn is that Spiegel intended to assume, and did assume, all the obligations of the overlease which were not specifically mentioned in the sublease.

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[1]Your petitioner apologizes for having failed to cite this case. In oral argument, Spiegel maintained that this case over-ruled one of the cases cited by your petitioner (Reply Br. 12). While it does not expressly do so, it clearly undermines the basis of the earlier decision. In Shepherd's citations, no indication is given that the later case has any adverse effect on the earlier one, and as a consequence, your petitioner had not read it.

There is no other reasonable inference, and under such circumstances, the findings of the trial court cannot be controlling.

Viewing it in a light most favorable to Spiegel, one can say no more of the transaction than this: that it is not clear from an examination of the documents which party was intended to pay for fire and boiler insurance, maintenance of the heating plant, and taxes. Petitioner readily concedes that specific provisions ought to have been inserted, but petitioner also urges that the absence of specific provisions does not mean that petitioner, rather than Spiegel, was intended to perform these obligations. Consequently, the extrinsic evidence offered by petitioner showing that Spiegel was intended to perform them, does not contradict the written agreement, but merely explains it. The references to the overlease which are contained in the agreement indicate, at the very least, that the parties intended the overlease to have some effect on their own contract. Under such circumstances, extrinsic evidence should be considered in deciding what that effect was.

When that evidence is considered, together with the two documents themselves, then the actions of the parties, both in the drawing of the contract and in acting under it, become consistent only with the interpretation that Spiegel assumed the obligations of the overlease.

Petitioner respectfully urges that if Your Honors will consider this evidence, it will become clear that there is only one reasonable way in which the history of this transaction might be reconstructed.

Petitioner was engaged in the furniture business. It entered into negotiations with Spiegel, Inc. to sell that

business, and, as a part of the transaction, to sell as well the right to occupy the building in which the business was carried on. To do that, petitioner could have made a short and simple assignment of its lease for a lump sum. Instead, and for undoubtedly sound financial reasons, it chose to make an arrangement in the form of sublease, under which it would receive more from Spiegel than it was required to pay to the owner—the difference constituting the inducement without which it would never have consented to make the sale.

To negotiate on the terms of the proposed instrument, petitioner's president and the president's son, neither of whom is an attorney, went to Chicago where they conferred with Spiegel's attorney, Mr. Klein, and with several officers of Spiegel. They had a copy of petitioner's lease before them. All persons then set out to draw up the sublease. They settled the preliminary terms and the rental provisions, and it was then agreed, in a general way, that the other obligations should be the same as those contained in petitioner's lease from the owner. Consequently, they decided to insert a provision in the proposed agreement that the overlease be attached to the sublease and made a part thereof.

But there were several provisions in the overlease which Spiegel did not want to include in its agreement with petitioner. Thus the provision: "It is expressly understood and agreed, however, that anything in said overlease to the contrary notwithstanding:" — and then follows a list of items different from any contained in the overlease.

Spiegel noticed that under the overlease the lessee was required to keep the premises in good condition and make

whatever replacements might be necessary. This was an obligation which Spiegel insisted be reduced, so it was agreed that, notwithstanding anything in the overlease to the contrary, petitioner would make any structural repairs which might be necessary, while Spiegel would be required to make only ordinary repairs.

Spiegel also did not wish to be bound by the provision in the overlease by which the lessee was required to pay the rent "promptly, and without demand," so it was decided that notwithstanding such provision, Spiegel should have a fifteen-day period of grace after the giving of notice before it should be in default for nonpayment of rent, and a thirty-day period of grace on the other obligations.

After studying the provisions in the petitioner's lease which deal with destruction by fire, Spiegel decided that it wanted a change there, too. Under the lease, if the building were destroyed, the lessor would have no duty to repair the building, unless there were about four years left to the term of the lease. If there were fewer years left, the obligations of both parties would terminate. Spiegel insisted upon a provision under which, notwithstanding the overlease, it alone would have the power to terminate, and under which petitioner would be required to rebuild in case of destruction, no matter when that destruction occurs.

The lease contains no provisions governing the parties' rights in case of eminent domain proceedings. It gives the lessee no right to terminate in any contingency except destruction by fire. Spiegel found this unsatisfactory and inserted a provision providing for abatement of rent if less than 25% of the premises were taken by eminent domain, and providing that if more than 25% were taken, Spiegel

should have a right to terminate, with no equivalent right in petitioner.

These provisions were inserted under the "notwithstanding" clause to indicate that the parties considered them as exceptions to the overlease. No exception was taken to the obligation in the overlease by which the lessee agrees to pay the cost of certain fire insurance, to pay for boiler explosion insurance, to pay half the cost of keeping up the heating plant, and to pay certain taxes.

After the conference at which these matters were discussed, petitioner's president and his son returned to Phoenix. Mr. Klein of Spiegel, Inc., then drew up the "sublease" in its final form and sent it to Phoenix for execution by petitioner. No changes in the instrument were made and it was executed exactly as drawn by Mr. Klein.

Everything went satisfactorily for more than four years. Spiegel paid the fire insurance, as the provision in the overlease required it to do. It also regularly paid for the boiler insurance and for the upkeep of the heating plant—matters covered in the overlease, but not mentioned in the "sublease." Spiegel acted as one who had intended to assume, and had assumed, obligations that originally rested on another.

But then in 1948, the taxes against the property exceeded the amount set down by the owner as the limit which he would pay. Petitioner was required to pay the difference to the owner under the lease, but thinking that Spiegel had assumed that obligation along with the others, petitioner requested payment from Spiegel. Then, for the first time, more than four years after the execution of the sublease, Spiegel claimed that it had not assumed any of the obliga-

tions of the overlease, and it repudiated its duty to pay the fire and boiler insurance and its share for maintenance of the heating plant.

Petitioner then brought this action against Spiegel to recover the amount paid. There was positive testimony by petitioner's president that the parties intended that the sublease should impose upon Spiegel the same obligations as contained in the overlease.

But the most telling testimony was that of Mr. Klein, Spiegel's attorney, and the man who drew the instrument. He was in agreement with the petitioner's president in referring to the above-mentioned provisions in the lease as being exceptions. But he differed with him on the question of what they were exceptions to. Petitioner's president thought they were exceptions to Spiegel's assumption of the overlease. Mr. Klein thought they were exceptions to "the things that we took subject to." This was an unusual way of phrasing the answer.

The ultimate question was, and is, which of the two parties here before the Court is bound to perform the obligations of the overlease. If, as petitioner contends, Spiegel is bound, then the whole transaction, and even the answer of Mr. Klein make sense. For in such context, when one makes exceptions, he makes exceptions to the assumption of obligations. But Mr. Klein, aware of a legalistic usage foreign to the general understanding of the layman, carefully inserted "the things that we took subject to." Yet, if petitioner's position is sound, even that makes sense, for it was no more than the, perhaps excusable, avoidance of an admission which would have immediately ended the case, and the substance of his answer was that he excepted these

things from the things that he assumed. The alternative is that petitioner, rather than Spiegel, is bound by the obligations. If that is true, then much of the transaction becomes difficult to understand, but more than that, Mr. Klein's answer becomes a meaningless mumbo jumbo. If Spiegel was assuming obligations, then it is understandable that he could make exceptions to them, but if it was not assuming them, and so they yet remained the obligations of petitioner, then his is a statement totally devoid of meaning—to say that he made exceptions to them. If they were not his obligations, he could not make exceptions to them. If they were not his principal's obligations, there would be neither need nor power to make exceptions to them.

If one man owed another a thousand dollars on a note, payable in one hundred dollar monthly installments, a stranger to the transaction could not make an exception to that obligation by which only fifty dollars should be due. Spiegel's position makes no more sense than that.

At two points in this case the phrase "subject to" has arisen—in the sublease, itself, and in Mr. Klein's testimony. If it is construed as meaning "obligated by," then the whole transaction becomes immediately clear, both because of the express terms of the document and because of Mr. Klein's testimony. If it is held to mean "limited by," as Spiegel contends, then both the exceptions in the instrument and the testimony of Mr. Klein become confusing verbiage.

Without question, the great majority of the cases have held that "subject to" did not impose an affirmative obligation. But they did *not* hold that the phrase can *never* impose such an obligation. In the construction of a written contract, the meaning that controls is the meaning under-

stood by men in general, and not that voiced by legal grammarians subsequently. A glance at this heading in "Words and Phrases" reveals how often litigants have been required to take their cases to court for a judicial determination. The force of *stare decisis* has been greater than the accepted usage of language by those whose rights the rule was intended to protect. (I put it to Your Honors whether the writers of the Bible meant "limited by" when it was written that Jesus went down into Nazareth with his parents and was subject to them, or when it was written, "Servants, be subject to your masters".)

If Spiegel assumed the obligations, then the transaction makes sense. If Spiegel did not assume them, it makes no sense.

When Mr. Klein testified "I said that we would except those things from the things that we took subject to," he must have meant what all the parties concerned had intended, viz.: "I said that we would except those things from the things that we assumed."

If Spiegel can advance, or Your Honors discover, a single other reasonable interpretation of that statement by the author of the contract, petitioner will concede that it is not entitled to judgment.

IV.

The welfare of petitioner for many years to come will be vitally affected by the opinion in this case, for since it constitutes a judicial determination of the nature of the transaction, petitioner will be required to expend large sums each year during the life of the lease, not only for taxes, but also for other lease expenses heretofore paid by Spiegel, and petitioner urges the Court that the cause is deserving

of Your Honors' closest scrutiny, and beseeches Your Honors to re-read the opinion filed in the case and to re-read the briefs filed by the parties, and then if Your Honors should think it desirable, to allow further oral argument.

WHEREFORE, it is respectfully urged that this petition for a rehearing be granted and that the judgment be, upon further consideration, reversed.

Respectfully submitted,

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and
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CERTIFICATE OF COUNSEL

I, NORMAN S. HULL, counsel for the above-named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay and that I believe it to be well-founded.

NORMAN S. HULL